No. 05-552

In the Supreme Court of the United States

ALBERTO R. GONZALES, ATTORNEY GENERAL,
PETITIONER

v.

MICHELLE THOMAS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY TO THE SUPPLEMENTAL BRIEF OF THE RESPONDENTS

PAUL D. CLEMENT
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

In the Supreme Court of the United States

No. 05-552

ALBERTO R. GONZALES, ATTORNEY GENERAL, PETITIONER

v.

MICHELLE THOMAS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY TO THE SUPPLEMENTAL BRIEF OF THE RESPONDENTS

On March 14, 2006, respondents filed a supplemental brief arguing that the government's petition for a writ of certiorari should be denied in light of Senator Arlen Specter's circulation of a draft bill that (i) would shift all petitions for review challenging removal orders to the United States Court of Appeals for the Federal Circuit; and (ii) would alter the Board's process of summarily affirming immigration judge decisions by, *inter alia*, requiring that the immigration judge's decision resolve all issues in the case and that the Board approve all of the immigration judge's reasoning. See Resp. Supp. Br. 2, 4; Resp. Supp. Br. App. 1a-9a.[1] The pen-

[1] Senator Frist recently introduced a bill with, *inter alia*, a provision to consolidate review in the Federal Circuit, but that bill does not

dency of that bill should have no affect on this Court's consideration of the government's petition for a writ of certiorari for two reasons.

First, there is "the very pertinent fact that the legislation is still unadopted." *United States* v. *American Trucking Ass'ns*, 310 U.S. 534, 550 (1940). Respondents' brief addresses the provisions of a "draft" bill that had recently been "circulated" in the Senate. Resp. Supp. Br. 1. On March 27, 2006, that bill was voted out of the Senate Judiciary Committee, but only after Title VII of the bill—which contains all of the provisions to which respondents refer—was removed from the bill. See Chairman's Mark, Comprehensive Immigration Reform Act of 2006, Amendment No. 3192 to S. 2454.[2] In addition, the version of the legislation passed by the House of Representatives contains neither of the provisions that, in respondents' view, counsel against this Court's exercise of its certiorari jurisdiction. See Resp. Supp. Br. 1 n.1; Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, H.R. 4437, 109th Cong., 1st Sess. (Dec. 15, 2005).

Second, the provisions of the draft bill on which respondents rely have nothing to do with the question presented. The question for which the government has sought this Court's review is whether the court of appeals erred in holding, in the first instance and without prior resolution of the questions by the Attorney General, that particular members of a family can and do constitute a "particular social group," within the meaning of

include a provision addressing summary affirmances by the Board. See S. 2454, 109th Cong., 2d Sess., §§ 501, 508 (introduced Mar. 16, 2006).

[2] The Senate Judiciary Committee held a hearing on April 3, 2006, on the provisions that had been contained in Title VII of the bill before it was voted out by the Committee.

the Immigration and Nationality Act's definition of "refugee," 8 U.S.C. 1101(a)(42)(A), and that the aliens were harmed "on account of" that status. That question addresses the proper scope of judicial review of agency action involving the interpretation and application of federal immigration law in asylum cases. The Immigration and Nationality Act provides that the "Attorney General may grant asylum" to an alien who applies in accordance with "procedures established by the Attorney General" if "the *Attorney General determines* that such alien is a refugee" within the meaning of 8 U.S.C. 1101(a)(42)(A). See 8 U.S.C. 1158(b)(1) (emphasis added), as amended by the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, Title I, § 101(a), 119 Stat. 302-303. Likewise, the withholding provision affords relief only if "the *Attorney General decides*" that the alien's life or freedom would be threatened on one of the protected grounds listed in 8 U.S.C. 1101(a)(42)(A). See 8 U.S.C. 1231(b)(3)(A) (emphasis added). This Court has held unanimously that, under those provisions, the proper interpretation and application of questions of immigration law is a task that "Congress has exclusively entrusted" to the Executive Branch in the first instance. *INS* v. *Ventura*, 537 U.S. 12, 16 (2002) (per curiam).

None of the provisions previously contained in the draft bill cited by respondents would have amended those statutory provisions or in any way addressed the proper scope of judicial review of agency action or the longstanding principles of administrative law reaffirmed by this Court's decision in *Ventura* and ignored by the Ninth Circuit here. Even if judicial review were shifted to the Federal Circuit or summary affirmances by the Board were limited, the question of the courts' proper role in reviewing agency action would remain. Indeed,

the government is aware of no provision in any pending immigration bill that addresses or purports to alter the scope of judicial review of the Board's decisions interpreting and applying the asylum law in a manner material to the government's pending petition.

The "mere possibility of future legislation" in the immigration area generally, *Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375, 405 n.17 (1970), untethered to the question presented to this Court, provides no sound basis for leaving in place a profoundly erroneous en banc ruling that squarely conflicts with precedent of this Court and the decisions of other circuits, and that has continuing and significant impact on the Executive Branch's ability to formulate and control the development of important areas of asylum law.

* * * * *

For the foregoing reasons and those stated in the government's petition and reply brief, the petition for a writ of certiorari should be granted.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

APRIL 2006